

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NOSSAMAN LLP,	)	1:10-cv-1627 OWW SKO
	)	
Plaintiff,	)	SCHEDULING CONFERENCE ORDER
	)	
v.	)	Cross-Motions for Summary
	)	Judgment Filing Deadline:
UNITED STATES DEPARTMENT OF	)	6/30/11
HOMELAND SECURITY,	)	
	)	Oppositions Thereto Filing
Defendant.	)	Deadline: 7/22/11
	)	
	)	Replies Thereto Filing
	)	Deadline: 8/5/11
	)	
	)	Hearing on Cross-Motions
	)	for Summary Judgment:
	)	9/12/11 10:00 Ctrm. 3

I. Date of Scheduling Conference.

February 9, 2011.

II. Appearances Of Counsel.

Nossaman LLP by Paul S. Weiland, Esq., and Robert D. Thornton, Esq., appeared on behalf of Plaintiff.

Yoshinori H.T. Himel, Esq., Assistant U.S. Attorney, appeared on behalf of Defendant.

III. Summary of Pleadings.

1. On March 16, 2009, Plaintiff sent a Freedom of Information Act ("FOIA") request ("FOIA Request") to Defendant

1 Department of Homeland Security Federal Emergency Management  
2 Agency ("FEMA"). The FOIA Request seeks specific public records  
3 relating to FEMA's administration of the National Flood Insurance  
4 Program ("NFIP") in the Counties of San Joaquin, Yolo,  
5 Sacramento, Solano, and Contra Costa and the cities specified in  
6 each of those counties. Complaint, ECF No. 6, Ex. 1. After  
7 nearly 8 months of repeated requests for a response to the FOIA  
8 Request (*id.*, Exs. 3-4), Plaintiff filed a formal administrative  
9 appeal of the constructive denial of its FOIA Request on November  
10 10, 2009 ("Formal Appeal"). *Id.*, Ex. 5. After nearly 10 months  
11 of repeated requests for a response to its Formal Appeal (*id.* Ex.  
12 7), and after nearly 18 months without any response to its FOIA  
13 Request, on September 9, 2010, Plaintiff filed the Complaint in  
14 this litigation.

15 2. In its Complaint, Plaintiff contends, *inter alia*, that  
16 Defendant failed to produce responsive records in response to the  
17 FOIA Request, that Defendant failed to produce a response to the  
18 FOIA Request within the time permitted by law, that Defendant  
19 failed to conduct an adequate search for agency records, that  
20 Defendant unlawfully withheld responsive agency records, and that  
21 Defendant failed to take final action in response to Plaintiff's  
22 November 10, 2009 Formal Appeal within the time permitted by law.  
23 Plaintiff prays for declarations of these violations, an order to  
24 produce all responsive records, and attorneys' fees and costs.

25 3. Defendant has searched its files for responsive records  
26 and has found about 200 pages. In October 2010 about half were  
27 released, with individuals' names redacted to protect personal  
28 privacy under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), and the

1 remainder are being processed for release.

2 4. Plaintiff has lately contended that records generated  
3 or maintained by Insurance Services Office Inc. of Central Point,  
4 Oregon, are agency records whether or not the agency has ever  
5 seen them. Defendant is investigating to arrive at a factual and  
6 legal determination on this new contention.

7 IV. Orders Re Amendments To Pleadings.

8 1. On October 19, 2010, the due date for the Defendant's  
9 first responsive pleading in this litigation, FEMA emailed  
10 Plaintiff a letter styled as FEMA's "final response" to the March  
11 16, 2009 FOIA Request. Included with the letter were 7 files  
12 containing various responsive agency records, some of which were  
13 redacted, in part, under FOIA Exemption 6, 5 U.S.C. § 552(b)(6)  
14 (exempting from disclosure "personnel and medical files and  
15 similar files the disclosure of which would constitute a clearly  
16 unwarranted invasion of personal privacy"). In the course of  
17 multiple telephonic early meetings of counsel beginning on  
18 October 27, 2010 to the present, counsel for the Defendant has  
19 informed Plaintiff's counsel that additional agency records  
20 responsive to the FOIA Request have been located, and are being  
21 reviewed and/or redacted pursuant to one or more of the  
22 exemptions to production under FOIA, 5 U.S.C. § 552(b).

23 2. In addition, Plaintiff takes the position that records  
24 produced and maintained by Defendant's private contractor on  
25 Defendant's behalf in the discharge of Defendant's statutory and  
26 regulatory duties under the National Flood Insurance Act and the  
27 NFIP in the counties and cities included in the FOIA Request are  
28 "agency records" under FOIA; therefore, FEMA must also conduct a

1 reasonable search of its contractor's records. Defendant is  
2 considering Plaintiff's position, but may reach the conclusion  
3 that records that are not in FEMA Region 9's physical possession  
4 are not "agency records," and no such search is required under  
5 the FOIA.

6 3. In light of the above developments that occurred after  
7 Plaintiff filed its Complaint on September 9, 2010, Plaintiff may  
8 request leave of this Court to amend the Complaint.

9 V. Factual Summary.

10 A. Admitted Facts Which Are Deemed Proven Without Further  
11 Proceedings.

12 1. The subject FOIA Request is a letter dated March  
13 16, 2009 from Audrey M. Huang of Nossaman LLP transmitted via  
14 email to Kevin J. Clark, Freedom of Information Contact, Federal  
15 Emergency Management Agency Region 9.

16 2. The subject Formal Appeal was initiated by way of  
17 a letter dated November 10, 2009 from Paul S. Weiland, Nossaman  
18 LLP, to the Associate General Counsel (General Law) of the  
19 Department of Homeland Security Federal Emergency Management  
20 Agency.

21 3. As of the date of filing of the Complaint on  
22 September 9, 2010, FEMA had not responded to Plaintiff's FOIA  
23 Request or its Formal Appeal.

24 4. On October 19, 2010, Defendant sent Plaintiff a  
25 letter styled as its "final response" to the FOIA Request, and  
26 produced some agency records responsive to the request.

27 5. In the October 19, 2010 production of records,  
28 Defendant redacted names of public officials under Exemption 6, 5

1 U.S.C. § 552(b)(6), asserting that the names are "personnel and  
2 medical files and similar files the disclosure of which would  
3 constitute a clearly unwarranted invasion of personal privacy."

4 6. On January 14, 2011, counsel for Defendant  
5 informed counsel for Plaintiff that Defendant has located more  
6 agency records responsive to the FOIA Request.

7 7. Plaintiff has not received a full and final  
8 response to their FOIA request.

9 B. Contested Facts.

10 1. None.

11 VI. Legal Issues.

12 A. Uncontested.

13 1. This Court's subject matter jurisdiction for this  
14 lawsuit is invoked under 5 U.S.C. § 552(a)(4)(B). Subject matter  
15 jurisdiction is never waived but is not challenged at this time.

16 2. Plaintiff Nossaman has standing to sue as the  
17 requester under the FOIA, and may be deemed to have exhausted its  
18 administrative remedies.

19 3. Venue in the Eastern District of California is not  
20 contested.

21 4. Plaintiff was entitled, under 5 U.S.C.  
22 § 552(a)(6)(A)(I) and 6 C.F.R. § 5.6(b), to receive a full  
23 response to the FOIA Request within 20 workdays of the request.

24 5. Defendant did not conduct a reasonable search  
25 within 20 workdays of the request, or provide a full response to  
26 the FOIA request within 20 workdays of the request.

27 6. Because FEMA failed to produce any responsive  
28 agency records in its control within the time limits provided by

1 5 U.S.C. § 552(a)(6), it may not charge any search fees required  
2 to locate the agency records it has yet to produce in response to  
3 the FOIA Request. 5 U.S.C. § 552(a)(4)(A)(viii).

4 7. Plaintiff was entitled to a determination on the  
5 Formal Appeal within the 20 working days provided by FOIA. 5  
6 U.S.C. § 552(a)(6)(A)(ii).

7 8. Defendant did not reach a determination on the  
8 Formal Appeal within the 20 working days provided by law.

9 B. Contested.

10 1. Whether Defendant's declaration concerning its  
11 search for responsive records will carry its burden of showing  
12 adequate search under the FOIA.

13 VII. Consent to Magistrate Judge Jurisdiction.

14 1. The parties have not consented to transfer the  
15 case to the Magistrate Judge for all purposes, including trial.

16 VIII. Corporate Identification Statement.

17 1. Any nongovernmental corporate party to any action in  
18 this court shall file a statement identifying all its parent  
19 corporations and listing any entity that owns 10% or more of the  
20 party's equity securities. A party shall file the statement with  
21 its initial pleading filed in this court and shall supplement the  
22 statement within a reasonable time of any change in the  
23 information.

24 IX. Discovery Plan and Cut-Off Date.

25 1. Discovery in FOIA cases is the exception, not the rule.  
26 *See Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F.Supp.2d 19, 25  
27 (D.D.C. 2000) ("discovery in a FOIA action is generally  
28 inappropriate."). Instead of discovery, the agency files

1 declarations aimed at affording the plaintiff "a meaningful  
2 opportunity to contest, and the district court an adequate  
3 foundation to review, the soundness" of the agency's action.  
4 *Berman v. CIA*, 501 F.3d 1136, 1141 (9th Cir. 2007). Before the  
5 making of those declarations, "no factual issue as to the scope  
6 and adequacy of the search exists." *Niren v. INS*, 103 F.R.D. 10,  
7 11-12 (D. Ore. 1984). After their filing, a plaintiff may be in  
8 a position to contend that they are conclusory, are controverted  
9 or are made in bad faith. See *Wolf v. CIA*, 473 F.3d 370, 374  
10 (D.C. Cir. 2007) ("[s]ummary judgment is warranted on the basis  
11 of agency affidavits when the affidavits describe 'the  
12 justifications for nondisclosure with reasonably specific detail  
13 . . . and are not controverted by either contrary evidence in the  
14 record nor by evidence of agency bad faith.'"). Accordingly,  
15 after defendant files its declarations, Plaintiff reserves its  
16 right under Fed.R.Civ.P. 56(f) to ask the Court to allow  
17 discovery.

18 Dates agreed for (a) Filing pre-trial motions (no later than  
19 45 days before Pre Trial Conference), (b) Pre-Trial Conference,  
20 (c) trial date:

21 2. Motion cutoff date: If the parties cannot reach  
22 agreement on whether records produced and maintained by FEMA's  
23 contractor, but which are not in FEMA's physical possession, or  
24 if the parties dispute the applicability of Exemption 6 or any  
25 other asserted legal basis for withholding responsive records in  
26 whole or in part, Plaintiff will file a motion for summary  
27 judgment on or before May 20, 2011, in which event Plaintiff may  
28 file a simultaneous cross-motion for summary judgment.

1           3.     Pretrial conference date: Defendant contends that  
2 trial is improbable because FOIA cases lack factual disputes and  
3 are resolved on motions for summary judgment. See *Cooper Cameron*  
4 *Corp. v. Dep't of Labor*, 280 F.3d 539, 543 (5th Cir. 2002)  
5 ("Summary judgment resolves most FOIA cases."). Therefore,  
6 Defendant contends that no pretrial or trial date need be  
7 suggested. Plaintiff contends that the October 19, 2011 "final  
8 response" to its March 16, 2009 FOIA Request and subsequent  
9 location of further responsive agency records supports a showing  
10 of lack of good faith effort to locate responsive records, a  
11 clear failure to provide a full response to the FOIA Request  
12 within the time permitted by law. Defendant has also failed to  
13 reach a determination on Plaintiff's Formal Appeal within the  
14 time provided by law. Therefore, Plaintiff contends that  
15 Defendant's anticipated motion for summary judgment will be  
16 denied. Plaintiff further contends that the same evidence would  
17 support a cross-motion for summary judgment and/or a motion for  
18 leave to conduct discovery. Trial may be required if disputed  
19 issues of material fact exist after completion of discovery.

20           4.     Trial date: None is suggested at this time. If the  
21 Defendant's motion for summary judgment is denied because one or  
22 more material facts remain to be decided, the parties will supply  
23 a supplemental joint scheduling report setting forth a proposed  
24 discovery plan, trial date, and related deadlines.

25           5.     Disclosure of FOIA responses: Defendant will endeavor  
26 to have its production of documents responsive to the FOIA  
27 requests and a Vaughn index served upon the Plaintiff on or  
28 before May 20, 2011.



1           6.     The parties will file cross-motions for summary  
2 judgment on or before June 30, 2011. The oppositions shall be  
3 filed on or before July 22, 2011. The replies shall be filed on  
4 or before August 5, 2011. September 12, 2011 at 10:00 a.m. in  
5 Courtroom 3 will be the hearing date for the cross-motions.

6           7.     Depending upon the outcome of dispositive motions, a  
7 further scheduling conference shall be set if necessary.

8 X.     Motions - Hard Copy.

9           1.     The parties shall submit one (1) courtesy paper copy to  
10 the Court of any motions filed. Exhibits shall be marked with  
11 protruding numbered or lettered tabs so that the Court can easily  
12 identify such exhibits.

13 XI.    Settlement Conference.

14           1.     The parties will notify the Courtroom Deputy in the  
15 event they believe a Settlement Conference will assist resolution  
16 of the case.

17           2.     Unless otherwise permitted in advance by the  
18 Court, the attorneys who will try the case shall appear at the  
19 Settlement Conference with the parties and the person or persons  
20 having full authority to negotiate and settle the case on any  
21 terms at the conference.

22           3.     Permission for a party [not attorney] to attend  
23 by telephone may be granted upon request, by letter, with a copy  
24 to the other parties, if the party [not attorney] lives and works  
25 outside the Eastern District of California, and attendance in  
26 person would constitute a hardship. If telephone attendance is  
27 allowed, the party must be immediately available throughout the  
28 conference until excused regardless of time zone differences.

1 Any other special arrangements desired in cases where settlement  
2 authority rests with a governing body, shall also be proposed in  
3 advance by letter copied to all other parties.

4 4. Confidential Settlement Conference Statement.

5 At least five (5) days prior to the Settlement Conference the  
6 parties shall submit, directly to the Magistrate Judge's  
7 chambers, a confidential settlement conference statement. The  
8 statement should not be filed with the Clerk of the Court nor  
9 served on any other party. Each statement shall be clearly  
10 marked "confidential" with the date and time of the Settlement  
11 Conference indicated prominently thereon. Counsel are urged to  
12 request the return of their statements if settlement is not  
13 achieved and if such a request is not made the Court will dispose  
14 of the statement.

15 5. The Confidential Settlement Conference  
16 Statement shall include the following:

17 a. A brief statement of the facts of the  
18 case.

19 b. A brief statement of the claims and  
20 defenses, i.e., statutory or other grounds upon which the claims  
21 are founded; a forthright evaluation of the parties' likelihood  
22 of prevailing on the claims and defenses; and a description of  
23 the major issues in dispute.

24 c. A summary of the proceedings to date.

25 d. An estimate of the cost and time to be  
26 expended for further discovery, pre-trial and trial.

27 e. The relief sought.

28 f. The parties' position on settlement,

1 including present demands and offers and a history of past  
2 settlement discussions, offers and demands.

3 XII. Request For Bifurcation, Appointment Of Special Master,  
4 Or Other Techniques To Shorten Trial.

5 1. None.

6 XIII. Related Matters Pending.

7 1. *Coalition for a Sustainable Delta and Kern County Water*  
8 *Agency v. Federal Emergency Management Agency, et al.*, Case No.  
9 1:09-cv-2024 OWW DLB.

10 2. Defendant says that these cases are unrelated except  
11 for Plaintiff's use of the subject FOIA request as a tactic to  
12 avoid possible discovery limits on its clients in the other case,  
13 brought under the Endangered Species Act. The courts have stated  
14 that Congress did not enact FOIA for the purpose of civil or  
15 criminal discovery.

16 XIV. Compliance With Federal Procedure.

17 1. The Court requires compliance with the Federal  
18 Rules of Civil Procedure and the Local Rules of Practice for the  
19 Eastern District of California. To aid the court in the  
20 efficient administration of this case, all counsel are directed  
21 to familiarize themselves with the Federal Rules of Civil  
22 Procedure and the Local Rules of Practice of the Eastern District  
23 of California, and keep abreast of any amendments thereto.

24 XV. Effect Of This Order.

25 1. The foregoing order represents the best  
26 estimate of the court and counsel as to the agenda most suitable  
27 to bring this case to resolution. The trial date reserved is  
28 specifically reserved for this case. If the parties determine at

1 any time that the schedule outlined in this order cannot be met,  
2 counsel are ordered to notify the court immediately of that fact  
3 so that adjustments may be made, either by stipulation or by  
4 subsequent scheduling conference.

5 2. Stipulations extending the deadlines contained  
6 herein will not be considered unless they are accompanied by  
7 affidavits or declarations, and where appropriate attached  
8 exhibits, which establish good cause for granting the relief  
9 requested.

10 3. Failure to comply with this order may result in  
11 the imposition of sanctions.

12  
13 IT IS SO ORDERED.

14 Dated: February 9, 2011

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE